ONG YAM CHONG & ANOR. v. CHAN WAH

[O.C.J. (Ong J.) August 29, 1961]

[C.A. (Thomson C.J., Good and Hill JJ.A.) December 11, 1961]

[K.L. — F.M. Civil Suit No. 3 of 1961]

Road accident — Collision between vehicles travelling in opposite directions — Lorry attendant thrown off — Presumption as to negligence in absence of special circumstances — Onus.

Fatal accident — Civil Law Ordinance, 1956, ss.7 and 8 — Third Party Procedure. R.S.C., O.16A.

A lorry attendant was riding at the back of a motor-lorry which was proceeding towards Kuala Lumpur when it came into collision with another motor-lorry travelling in the opposite direction, causing the attendant to be thrown off the lorry resulting in his death. An action was brought by the deceased's widow and mother as administratrices of his estate for damages under sections 7 and 8 of the Civil Law Ordinance, 1956. The defendant, driver of the 2nd lorry, then issued a third party notice under R.S.C., Order 16A claiming from the owner and driver of the 1st lorry an indemnity or contribution in respect of the plaintiff's claim for damages and costs. There was no reliable evidence as to the exact point on the road where the collision took place, and Ong J. who was left with two conflicting accounts of the same accident applied the principles enunciated in *Baker* v. *Market Harborough, etc.* (1) that both drivers were negligent and gave judgment against the defendant for a total sum of $15,100 in respect of both general and special damages and costs and ordered that the defendant be entitled to recover 50% of the contribution from the third party. On appeal,

Held: following the principles enunciated in *Baker* v. *Market, etc.* and *France* v. *Parkinson* (3) where there is a collision between two vehicles travelling in opposite directions on such a road then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other driver rather than himself was negligent. Decision of Ong J. affirmed.

Observation on the application of the above principle to roads other than cross-roads.

Per **Thomson C.J.**: "In my view we are not treating the decisions of the English Courts of Appeal in *Baker* v. *Market Harborough, etc.* and *France* v. *Parkinson* as laying down any rule of law but rather as illustrative of the application of the principles of logic and common sense to circumstances which do not infrequently arise."

Cases referred to:—

(1) *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472, 1476.

(2) *Bray* v. *Palmer* [1953] 1 W.L.R. 1455.

(3) *France* v. *Parkinson* [1954] 1 All E.R. 739.

ACTION.

Denis Murphy for the plaintiffs.

E. C. Khoo for the defendant.

N. A. Marjoribanks for the third parties.

In the Court below the following judgment was delivered, —

Ong J.: At about 7 a.m. on June 16, 1959, a lorry attendant, Tan Choon Hin, was riding at the back of motor-lorry, No. BC. 360, proceeding from Kuala Lumpur towards Ulu Yam Bharu when it came into collision with another lorry No. B. 5801 travelling in the opposite direction. This collision occurred near a bend of the Ipoh Road, at the 3¼ mile, causing the attendant to be thrown off over the back or side of the lorry, resulting in his untimely death. An action was brought by the deceased's widow and mother, the administratrices of his estate, for damages under sections 7 and 8 of the Civil Law Ordinance, 1956, on the ground that the death of the deceased was due to the negligence of the driver of lorry B. 5801, the defendant in the action. The defendant then issued by leave of the court, a third party notice, under the provisions of R.S.C., Order 16A, claiming from the third parties, who were the driver and owner respectively of lorry BC. 360, an indemnity or contribution in respect of the plaintiffs' claim for damages and costs. He alleges that the accident was caused solely or contributed to by the negligence of the third party driver. The averment and particulars of negligence in the plaintiff's statement of claim against the defendant are substantially repeated in the defendant's statement of claim against the third parties, and by their respective defences the defendant and third parties each throw the blame on the other.

The evidence, briefly, is as follows: Sergeant 3653 of the Traffic Police who came to the scene an hour after the accident, and produced a sketch plan thereof, testified that each vehicle was only slightly damaged. Such damage clearly proves that the side planking on the body of these vehicles had fouled each other only by a mere matter of inches in the act of collision, and the effect thereof was that of a glancing blow which probably rocked each vehicle but was not such as to deflect either of them off the course it had been following immediately before the accident. Each vehicle pulled up eventually on its own side of the road, 164 feet apart. The sergeant deposed to having seen bloodstains on the middle of the road and on the left side of the road in relation to the deceased's lorry; and to the presence of a brake-mark or tyre-mark 11 feet long almost along the centre line of the road. They are of entirely no value for determining who was liable. The tyre marks might have been made by either vehicle, or by any of the thousands that had previously passed over this place. It was urged that the blood-stains indicated the exact spot where the deceased fell off BC. 360. However, this evidence in no way indicated the positions of the vehicles on the road when they collided, since the deceased must have been perched precariously on top of the fully-loaded vehicle, and there was not a scintilla of evidence as to where he was so perched, before he was dislodged by the impact, nor whether he fell off over the back or over the left or right side of the vehicle. These stains are therefore absolutely valueless in assisting me to decide which vehicle, if not both, was or were on the wrong side of the road. The police sergeant further deposed that he saw two iron stays at "F" and "G" on the sketch plan which had been wrenched off from the off-side of the body of B.C. 360. Their evidential value is again totally negative.

Besides this independent police witness, the parties called eye-witnesses to give their respective versions of the accident. The plaintiffs called as their witness a passenger seated beside the driver of BC. 360. The defendant himself gave evidence and called his attendant who could not say how the accident happened. The third-party driver alone gave evidence on his own behalf. Leow Lai Gek, the passenger in BC. 360, was vague and uncertain in testimony. I do not, in the ordinary course, expect passengers to be paying close attention to the driving of a vehicle unless they were anxious about their own safety by reason of the manner the vehicle was being driven, which was not the case here. In an emergency, of a mere moment's duration, I do not believe any passenger can say, except roughly, the position each moving vehicle was occupying at a given moment of time. This applies equally to the witness Leow Lai Gek. I therefore consider his evidence as entirely negative in character. Of the two drivers who seek to blame each other, all I need say is that I believe neither of them to be free from blame.

The road at this point is 21 feet wide: the aggregate width of the two lorries is 14 feet 6 inches. Daily, thousands of vehicles of similar dimensions pass each other here without mishap, and on a clear dry day with perfect visibility for an adequate distance ahead of each driver travelling at a reasonable speed, I am satisfied that the accident could not have occurred but for want of care on the part of both drivers. Assuming that there were cyclists being overtaken by B. 5801 and that it had to pull out slightly from the side of the road in order to do so, this was what the driver of BC. 360 ought reasonably to have expected the other driver to do. Although he foresaw or ought to have foreseen the latter's next move, the driver of BC. 360 took no avoiding action whatsoever. Like many others of his ilk, he appears to have thought that he owed no duty of care to other road-users so long as his vehicle kept to its own half of the road, however closely he might be hugging its centre line. As to the driver of B. 5801, if BC. 360 was in such a position that he could not safely have overtaken the cyclists without going dangerously near to the cyclists on his near-side or the oncoming lorry on the off-side and thereby risking a collision, then he had no business to take such risk. Both drivers were clearly road-hogs, and as between them I cannot say that one was less culpable than the other.

I find as a fact that the collision took place on the middle of the road or so near to it makes no difference.

At the trial the facts of this case as disclosed in evidence immediately recalled to my mind *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1] which I think I ought to follow because it sets out the principles which I ought to apply. In his judgment Denning L.J. (as he then was) said:

> "It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability . . . In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame. It is very different from a case where one or other only is to blame, but clearly not both. Then the judge ought to make up his mind between them, as this Court said recently in *Bray* v. *Palmer* [2]. But when both may be to blame, the judge is under no such compulsion and can cast the blame equally on each. . . . Assume that one of the vehicles was over the centre line a few inches, and thus to blame, why did not the other one pull in more to its near side? The absence of any avoiding action makes that vehicle also to blame. And once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each."

Accordingly, I gave judgment against the defendant for a total sum of $15,100 in respect of both general and special damages and costs, and ordered that the defendant be entitled to recover 50 per cent. contribution from the third party. Since an appeal has been brought by the third parties only against such portion of my judgment as decides that they are liable for such contribution, it is unnecessary here to deal with the quantum of damages.

COURT OF APPEAL.

N. A. Majoribanks for the appellants.

V. C. George for the respondent.

Good J.A. (delivering oral judgment): This is an appeal against a decision of Mr. Justice Ong in the High Court at Kuala Lumpur in which, briefly, the learned trial judge found that both drivers involved in an accident, to which I shall refer in a moment, were equally negligent.

The accident occurred just before the 3¾ milestone going out of Kuala Lumpur on the Ipoh Road and it took place at 7 o'clock on the morning of 16th June, 1959. A lorry number BC. 360 was proceeding north out of Kuala Lumpur. It was driven by Ong Yam Chong who came into these proceedings as a third party. The other lorry number B. 5801 being driven in the direction of Kuala Lumpur was driven by Chan Wah, who was the original defendant.

The present appellants are the owner and driver of lorry number BC. 360. The respondent is the driver of lorry number B. 5801.

There is very little evidence — in fact the learned trial judge found, and I see no reason to disagree with him, that there was no reliable evidence — as to the exact point on the road where the collision took place. It was not a serious collision. It was a case of two vehicles striking against each other in a glancing blow along the off-side and in the ordinary way a

collision of this kind would not produce any fatal or serious results, but unfortunately in this case there was an attendant on the lorry number BC. 360 who was apparently dislodged by the shock of the impact and fell off on to the road and was killed.

There were three witnesses as to what occurred immediately before and at the time of the collision. One was plaintiff's witness No. 2 who was sitting beside the driver of lorry number BC. 360 and the other two witnesses were the two drivers. The learned trial judge was clearly not impressed by the evidence of P.W. 2, the passenger. He says in relation to his evidence:—

"Leow Lai Gek, the passenger in BC. 360 was vague and uncertain in testimony."

That is an expression of opinion which he was perfectly entitled to make on the demeanour of this witness and however the witness' evidence may read on the record it is perfectly clear that the learned trial judge did not find him an impressive or satisfactory witness. He then goes on to consider the weight to be given to the evidence of a passenger in a vehicle saying that he does not expect him to be paying close attention to the driving and he ended his consideration of this witness by saying:—

"I therefore consider his evidence as entirely negative in character."

I think he meant not that he gave negative evidence but that the evidence which he did give had a negative effect. He was perfectly entitled to arrive at that conclusion having seen and heard the witness and having considered the circumstances in which he was speaking of the accident. Speaking for myself, I see no reason to interfere in any way with the way in which the learned trial Judge has dealt with that particular evidence. He was then left with two conflicting accounts of the same incident. He relied on *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1] which was also referred to in this court, to which I will return in a moment, and came to the conclusion that in effect the position was that there was not enough evidence to enable him to make up his mind that one of the two drivers of the vehicles was to blame rather than the other.

In the Court of Appeal in another case *France* v. *Parkinson* [3] the case of *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* was considered and the Court of Appeal approved the decision of Mr. Justice Sellers in that case. They also referred to their own decision in the appeal against Mr. Justice Ormerod whose decision was reversed. In the case of *France* v. *Parkinson* there had been a collision between two vehicles on a cross-road where the two roads were of equal status, with no major or minor road involved, and in that case Lord Justice Somervell as he then was, said:—

"Each case turns on its own facts, but I would have said that in the case of a collision at cross-roads where both roads were of equal status, in the absence of special circumstances the balance of probabilities was in favour of both drivers having been negligent."

Lord Justice Birkett in the next judgment said:—

"The cross-roads as shown on the plan are very spacious, and in the ordinary way one would think that, if people exercised ordinary care, an accident would not take place there. We only know that a collision did take place between two motor cars at that wide and spacious cross-roads. I should have thought that on those facts there was a *prima facie* case that both the drivers were negligent."

I am of the opinion that that principle, although in that case it applies to cross-roads, can also be applied to straight or nearly straight roads with a wide carriage way where there are no obstacles to visibility such as bends or obstructions and where you have a collision between two vehicles travelling in opposite directions on such a road then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other driver rather than himself was negligent. As I said earlier, disregarding, as the learned trial judge thought fit to do, the evidence of P.W. 2 you have two conflicting stories advanced by the two drivers and the learned trial judge failed to find as a fact that one was to blame rather than the other or that the story told by one was more probable than the story told by the other. He started from the presumption that they were both negligent and then he failed to find any evidence to rebut that presumption.

We have heard in the course of argument in this Court on behalf of the appellants a good deal about the lorry number BC. 360 having been on its proper side of the road during the material period but it seems to me that, the width of the road, as proved in evidence, being 21 feet, in relation to the width of the lorries, proved in evidence as 7½ feet and 7 feet, totalling 14½ feet, allowed sufficient margin for one lorry to pass a cyclist or cyclists, and still leave room for an on-coming lorry to pass safely. What it comes to is (it is a matter of arithmetic): if the road is 21 feet wide and you have cyclists occupying "X" feet of the road, the effective width of the road will be 21 minus X and if 21 minus X is greater than 14½ feet the two lorries driven carefully should be in a position to avoid a collision. If the driver of lorry number BC. 360 saw that the other lorry B. 5801 was overtaking cyclists and that he would have to pull out in order to pass them, surely it was his duty to take immediate avoiding action and get as far over as he could to give the on-coming lorry his fair share of 21 minus X feet and on the evidence in the case, speaking for myself, I do not think that the driver of lorry number BC. 360 was able to show that that is in fact what he did.

In all the circumstances I can see no reason for interfering with the findings of the learned trial judge and I would dismiss the appeal with costs.

Thomson C.J. (delivering oral judgment): I entirely agree with everything my Lord has said.

I only wish to add one word.

I do not imagine that this case is likely to go elsewhere. My experience of local litigation, however, suggests to me that we may hear a great deal about it here in the future, and that being so I think I should make it clear that in my view we are not treating the decisions of the English Court of Appeal in *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1] and in *France* v. *Parkinson* [3] as laying down any rule of law but rather as illustrative of the application of principles of logic and common sense to circumstances which do not infrequently arise.

The present appeal is dismissed with costs and there will be an order for payment out of the deposit to the respondent against his taxed costs.

Hill J.A. concurred.

Appeal dismissed.

JOHN v. DHARMARATNAM

[C.A. (Thomson C.J., Good J.A. and Ong J.) September 24, 1961]

[J.B. — F.M. Civil Appeal No. 10 of 1961]

Libel and Slander — Damages — Pecuniary loss suffered as a result of libel — Proof of.

Practice and Procedure — R.S.C., O.36 r.37 — Operation of rule.

In an action for damages for pecuniary loss suffered as a result of libel it is for the party who brings such action to prove the damages that he has suffered.

Order 36 rule 37 can only operate to cut out evidence which it is sought to put in solely for the purpose of mitigating damages and cannot be read so as to keep out evidence which is otherwise relevant but which could incidentally have some effect on the quantum of damages.

Cases referred to:—

(1) *Bonham-Carter* v. *Hyde Park Hotel Ltd.* 64, T.L.R. 177, 178.

(2) *Scott* v. *Sampson* 8 Q.B.D. 491.

COURT OF APPEAL.

Keith Sellar for the appellant.

J. F. McWilliam for the respondent.

Good J.A. (delivering oral judgment): The appellant who was the plaintiff in the Court below was awarded $500 damages for the injury to his reputation which the law presumes in the case of a libel on a man in the way of his business, trade or profession but in addition he claims damages for particular pecuniary losses which he attributes to the fact of the libel. The learned trial judge considered this question and considered it with some care. The appellant has submitted that the judge misdirected himself in two respects, one of which is a negative one and the other a positive one: that he did not take into account these losses from the plaintiff's business in assessing damages, and that he did take into account a number of other matters which he considered might have been responsible for these losses. Speaking for myself I do not think that the appellant established any connection between the publication of the libel by the defendant and the loss of revenue from his business which occurred after that publication. He no doubt could, and the learned trial judge thought he should, have adduced evidence if indeed the losses were due to the libel.

My attention has been drawn to a passage from the judgment of Lord Goddard in *Bonham-Carter* v. *Hyde Park Hotel Ltd.* [1] which to me appears to be very apt in the circumstances of the present case where the learned Lord Chief Justice said:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

The appellant's counsel in the appeal before us has not gone so far as to suggest that there is any presumption of law that the losses alleged by the appellant were due to the libel but he has asked us to draw the inference that they were; and while it is a possible inference it is of course not an exclusive one and there are a number of other possible reasons for these losses both in the record of the evidence and other speculative ones.

In all the circumstances I am of the opinion that the learned trial judge was correct in not awarding any sum specifically for these alleged losses of income and that leaves us with the $500 general damages. Again, speaking for myself, I would have awarded that amount or more or less but I cannot see that there is any manifest error in the amount awarded and I would not be disposed to interfere with the amount so awarded. I would therefore dismiss the appeal with costs.

Thomson C.J. (delivering oral judgment): I agree with what my Lord has said and would only, out of regard to the argument which Mr. Sellar has addressed to us, say a few words regarding the interpretation of Order 36 rule 37.

I think it is clear beyond any question that that rule which was enacted subsequent to the decision of the Court of Queen's Bench in *Scott* v. *Sampson* [2] was enacted in consequence of what was said in that case and that being so I think we have to read it with Order 19 rule 4 and Order 21 rule 4.

Order 19 rule 4 is a rule we are all familiar with. "Every pleading shall contain.....a statement in a summary form of the facts on which the party pleading relies for his claim or defence" and then Order 21 rule 4 says in general terms: "No denial or defence shall be necessary as to damages claimed or their amount: but they shall be deemed to be put in